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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 157

MARK COPPEDGE, JR.,

Petitioner,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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INDEX

SUBJECT INDEX

Page

REPLY BRIEF FOR PETITIONER:

I. As to In Forma Pauperis Procedure 2

II. As to the Attack on the Indictment 4

III. As to the Use of Artis' First-Trial Testimony 8

IV. As to the Rule on Accomplice Testimony 8

V. As to the *Barry* Decision 14

V. As to the Barry Decision 14

CONCLUSION 16

CITATIONS

CASES:

Barry v. *United States*, 287 F.2d 340 14
Costello v. *United States*, 350 U.S. 359 ..... 4, 5
Ellis v. *United States*, 356 U.S. 674 3
Holt v. *United States*, 218 U.S. 245 ..... 4, 5
Kotteakos v. *United States*, 328 U.S. 750 14
Krulewitch v. *United States*, 336 U.S. 440 14
Lawn v. *United States*, 355 U.S. 339 ..... 4, 5
Lurk v. *United States*, 366 U.S. 712 2
Mattox v. *United States*, 156 U.S. 237 11
Nye & Nissen v. *United States*, 336 U.S. 613 15
United States v. *Turnipseed*, 272 F.2d 106 (7th Cir. 1959) 15
United States v. *Williams*, 341 U.S. 58 15

OTHER AUTHORITIES:

Model Code of Evidence, Rule 531(a) 12
Uniform Rules of Evidence, Rules 63 and 65 12

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The Government's brief continues the strenuous and almost inexplicable efforts the Government has been making for about a year and a half to prevent this petitioner from obtaining a full appellate review on the merits of petitioner's direct appeal from a federal criminal conviction.

But now the Government has jettisoned completely many of the contentions it advanced, respectively, in its opposition filed in the Court of Appeals (R. 35-40) and in its brief in opposition previously filed in this Court. The Government's brief espouses a new group of contentions which the Government now claims would show that petitioner's appeal, in each and all of its aspects, is "plainly frivolous". While the Government's new contentions—however belatedly advanced—are even less persuasive than their prede-

cessors, they do serve to underscore the reasons why petitioner is entitled not merely to receive a full appellate determination on the merits, but also to prevail when the merits are adjudicated.

I.

As to In Forma Pauperis Procedure.

Everything the Government says (pages 22-37) in its labored effort to condone and sustain the procedure which was followed by the Court of Appeals is admittedly irrelevant to this case if—contrary to what the Government is urging—petitioner's appeal raises one or more questions not "plainly frivolous". Since the nonfrivolous nature of petitioner's questions appears so abundantly, perhaps it is unnecessary to say more on this aspect of the case.

Yet, a few additional comments may help to put the matter in perspective.

Nowhere does the Government's brief discuss or refer to or even cite the recent case of *Lurk* v. *United States*, 366 U.S. 712, where the Court of Appeals had followed a procedure substantially identical to the procedure the Court of Appeals followed in this case. In *Lurk* the Government made a comparable effort to condone and sustain the adequacy of the procedure. This Court's disposition of *Lurk* constituted a total rejection of the Government's contentions concerning the adequacy of the procedure.

Nowhere does the Government's brief furnish anything to controvert the facts set forth in petitioner's brief (pages 31-36) which show the gross discrimination being practiced against this petitioner and other indigent appellants in the Court of Appeals for the District of Columbia Circuit.

Full appellate consideration of the merits of a direct appeal in a criminal case cannot be granted to the rich and denied to the poor. The right to designate a record on appeal and have it transmitted to the Court of Appeals (which was denied to petitioner)—so as to be sure that an appeal record is properly compiled and is placed before the appellate judges in a complete, intelligible and orderly fashion—is a right which cannot be granted to the rich and denied to the poor. The right to file a brief on the merits in the Court of Appeals (which was denied to petitioner) is a right which cannot be granted to the rich and denied to the poor. The right to argue orally in the Court of Appeals (which was denied to petitioner) is a right which cannot be granted to the rich and denied to the poor. The right to have a full appellate adjudication on the merits (which was denied to petitioner) is a right which cannot be granted to the rich and denied to the poor.

These are matters making the vital difference between equal justice and unequal justice. They are not merely matters of semantics or terminology. Indeed, the Government's brief in this case illustrates how easy it is, even for able public servants, to fall into the habit of characterizing an indigent's contentions as "plainly frivolous" when the Government happens to disagree with them. Surely the teachings of *Ellis* v. *United States*, 356 U.S. 674, are still a long way from being accepted and applied either by the Government or by the Court of Appeals for the District of Columbia Circuit.

II.

As to the Attack on the Indictment.

The Government's brief (page 38) says that three decisions by this Court—namely, *Costello* v. *United States*, 350 U.S. 359, *Lawn* v. *United States*, 355 U.S. 339, 349-350, and *Holt* v. *United States*, 218 U.S. 245—"show that, at least where there is some other evidence before the grand jury, a claim that a witness lied to the grand jury cannot lead to dismissal of the indictment".

In the first place, it has not been established here that there was "some other evidence before the grand jury" implicating petitioner. It is true that Judge McGuire, who made an *in camera* inspection of the grand jury proceedings, thought that there was (R. 28-30). The grand jury transcript, however, was erroneously withheld from defense counsel (petitioner's brief, pages 41-42); it has never been transmitted to nor examined by the Court of Appeals (petitioner's brief, pages 42-43); and in this posture of the case the very minimum requirement for appellate review would be for the Court of Appeals to examine the grand jury transcript *in camera* to determine whether Judge McGuire was right or wrong.[1] Until this has been done by an appellate court, it could not properly be assumed by any appellate court that—as the Government claims—there was

[1] In the Court of Appeals the Government's opposition, referring to petitioner's contention that the Court of Appeals should inspect the grand jury minutes to pass upon the correctness of Judge McGuire's ruling, claimed "No such examination is warranted under *Costello* v. *United States*, *supra*" (R. 37). The Government's brief in this Court neither reasserts this erroneous claim nor makes any answer whatever to petitioner's contention; instead, as has been indicated, the Government builds its principal position on an assumption—as yet unverified by appellate scrutiny—that there was some other evidence before the grand jury to implicate petitioner.

"some other evidence before the grand jury" implicating petitioner.

But in any event, not a single one of these three decisions cited by the Government involved in any way the question we have here—the effect of perjured testimony given by a witness before the grand jury. *Costello*, as has been shown (petitioner's brief, pages 37-38) involved hearsay evidence used before the grand jury. *Lawn* involved some vague "unsupported suspicions", 355 U.S. at 350, that the grand jury had made use of some materials which the defendants had produced at an earlier grand jury proceeding where they had not been warned of their privilege against self-incrimination. *Holt* involved testimony before the grand jury that an accused had made certain admissions obtained under circumstances making them incompetent at the trial; Mr. Justice Holmes' opinion for the Court carefully states, 218 U.S. at 247-248:

> "Without considering how far, if at all, the court is warranted in inquiring into the nature of the evidence on which a grand jury has acted, and how far, in case of such an inquiry, the discretion of the trial court is subject to review, *United States* v. *Rosenburgh*, 7 Wall. 580, it is enough to say that there is no reason for reviewing it here. All that the affidavit disclosed was that evidence in its nature competent, but made incompetent by circumstances, had been considered along with the rest."

Thus, none of these cases dealt with perjured testimony brought before the grand jury; *a fortiori*, none of them dealt with perjured testimony which was either the sole or a most substantial basis for the action taken by the grand jury in indicting the particular defendant; and *a fortiori*, none of them dealt with a situation where the claim of such

perjury was made manifest by a documented motion duly submitted before the trial began.

The Government's brief (page 39) claims that petitioner's position "would fetter the investigatory power of grand jurors" because "any indictment could be subject to invalidation upon the recantation of a single witness". As appears from petitioner's brief (pages 38-41), this is not petitioner's position. A recantation by a single witness would not affect the indictment unless the witness had testified to something that was a substantial and material matter; and then it would first be incumbent upon the trial court, when the question was duly raised before it, to satisfy itself as to the truthfulness of the recantation and also to determine whether, in the light of the entire grand jury proceeding, it can be known with reasonable certainty that the grand jury would have indicted the particular defendant anyway. It is only after such inquiries have been made that the trial court would reach the question whether or not the indictment ought to be dismissed.

Far from frustrating the operation of the grand jury system, this will strengthen and protect it.

The Government's brief (page 39) adopts a different approach in seeking to avoid the force of petitioner's contention (petitioner's brief, pages 43-46) that in any event the District Court, before determining that the indictment should be upheld, should have made a factual inquiry into whether Government agents were responsible for inducing false and perjured testimony by Thompkins for presentation to the grand jury. The Government's brief does not intimate the slightest disagreement with petitioner's legal arguments—namely, that an indictment is subject to attack on such a ground, and that where such a claim is properly advanced a hearing must be held to determine what the

facts are. Instead, the Government's brief (page 39) now claims that this contention "was never seriously urged" in the trial court. But in the supporting documents accompanying the motion to dismiss the indictment, the allegation clearly was sufficiently articulated to require a hearing (see summarization of record in petitioner's brief, pages 7-9). Moreover, when the motion was argued before Judge McGuire on December 11, 1959, Judge McGuire acknowledged that as he understood the gist of the motion, "it is to the effect that a witness who appeared before the Grand Jury was promised if he went before the Grand Jury and testified falsely against the defendant in this case, he, himself, would not be prosecuted" (R. 69). The colloquy then continued (R. 69):

> "Judge McGuire: Is that it?
>
> "Mr. Cohen [defense counsel]: Well, if not be prosecuted, he would be—certain considerations, yes.
>
> "Judge McGuire: Well, or given certain considerations. . . ."

Since the point stood out as clearly as this to Judge McGuire at the time the motion was submitted and argued, it is especially anomalous to find the Government now making a claim—two years and two courts later—that this very point "was never seriously urged".

III.

As to the Use of Artis' First-Trial Testimony.

(A) The Government's brief (page 43) makes a half-hearted suggestion that perhaps, after all, petitioner's trial counsel did not really want to introduce into evidence the Artis recantation statement. The record refutes the suggestion.

What happened was that when the prosecutor stated his intention to introduce Artis' first-trial testimony (R. 90), a colloquy ensued which occupies about nine pages of the transcript (R. 90-95). During the course of this colloquy defense counsel urged, as one of the reasons why the Artis first-trial testimony should not be admitted, that defense counsel had a writing, signed by Artis which was not in existence at the time of the first trial, stating that Artis' first-trial testimony was not true (R. 91-92). Defense counsel immediately acceded to Judge Holtzoff's initial suggestion that the document be turned over to the FBI for comparison with known specimens of Artis' handwriting, and also informed the court that he (defense counsel) had compared it with the one or two money orders in evidence in the case bearing Artis' signature and it appeared genuine (R. 92). After this and further colloquy Judge Holtzoff announced that he would admit the first-trial testimony of Artis (R. 94). After a further unsuccessful effort to persuade Judge Holtzoff that Artis' first-trial testimony should be excluded (R. 94), defense counsel repeated his objection and then stated "if his testimony should be found admissible by Your Honor that I would like introduced in evidence the statement which we have from Mr. Artis that we discussed" (R. 95). Defense counsel then handed the recantation statement to Judge Holtzoff, who after some further discussion said "I will not admit

that" (R. 95). Defense counsel sought to persuade Judge Holtzoff that if the genuineness of Artis' signature was established the document should be admitted (R. 95). Judge Holtzoff said even if it was Artis' signature (R. 95) he was certainly not going to admit it (R. 96), to which defense counsel said "I would, of course, respectfully object" (R. 96). Defense counsel made another effort to persuade Judge Holtzoff to admit the recantation statement (R. 96), but Judge Holtzoff reiterated "I am not going to admit it" (R. 97). Defense counsel made yet another effort to continue the argument (R. 97), but Judge Holtzoff told him that although he could have it marked for identification, "I am not going to admit it, in view of the fact that it is not in his handwriting" (R. 97). Having been told expressly and four times by Judge Holtzoff that the document would not be admitted, surely there was no need for defense counsel to persist even further by making a fifth attempt.

(B) On another ground the Government's brief (pages 41-42) also seeks to avoid meeting, or even discussing, the legal issues raised by Judge Holtzoff's refusal to admit Artis' recantation statement. The Government now says there was not any showing that Artis' recantation statement was made subsequent to the first trial.

There are two separate answers to this. First, there was sufficient showing that the recantation statement was made subsequent to the first trial. Second, even if it had been made prior to the first trial, the applicable rules of evidence would still require that it be admitted.

First, as the record makes plain, the Artis recantation was offered as a subsequent recantation statement and was dealt with by Judge Holtzoff entirely on that basis. Defense counsel's initial reference to the document was that he had a writing signed by Artis "stating that the testi-

mony that he gave [at the first trial], to which Mr. Flannery [the prosecutor] refers, was just not so" (R. 91), and Judge Holtzoff commented "the fact that he later recanted his testimony, if he did, would not affect its admissibility" (R. 91). Defense counsel next said that "at the time he [Artis] first testified, this statement that I have signed by the gentleman was not in existence, was not available to defense counsel" (R. 91-92). The entire subsequent colloquy at the trial was on the assumption and the understanding that the document was being offered as a recantation executed subsequent to Artis' testimony at the first trial (R. 92-97). The prosecutor raised some question as to whether the document was genuine (R. 92), and defense counsel immediately agreed to turn it over to the FBI for comparison with other specimens of Artis' handwriting (R. 92, 94). If the prosecutor or the judge had raised any question—such as the one now suggested by the Government's brief nearly two years later—as to whether the statement was executed prior to, rather than subsequent to, Artis' first-trial testimony, then the details of this matter could have been even further developed at the trial—if indeed Judge Holtzoff would have permitted this when he had ruled four times that, assuming Artis' signature to be genuine, nevertheless he was excluding the recantation statement.

Even more far-fetched is the further suggestion in the Government's brief (page 42) that "it is reasonable to conclude that it was drafted shortly after Artis' cerebral vascular accident in July 1958, well before his first trial testimony" on December 11, 1958. The Government bases this suggestion on the facts that the Artis statement includes the sentence "I have just suffered a stroke" (R. 22) and a medical record shows Artis had been admitted to a

hospital on July 19, 1958, suffering from a stroke (R. 141).[2] The Government's brief omits to say that this medical record only covers the period ending December 4, 1958 (R. 140-141), and hence does not include a record of the severe illnesses suffered by Artis subsequent to the first trial, which culminated in Artis' being unavailable as a witness at the second trial. Moreover, the recantation statement says it is made "to clear my own conscience" and "for the benefit of clearing my conscience" (R. 22). If the recantation, instead of the first-trial testimony, is true, then Artis—having been classified as a fugitive (R. 140) and not having been arrested until November 25, 1958, when he was found in North Carolina (R. 126)—would have had no occasion to "clear his conscience" just after his July 1958 stroke or indeed until after he had given false testimony at the first trial. Assuming Artis' first-trial testimony was to be admitted at all, the jury should not have been deprived of the opportunity to draw its own conclusions on the matter.

Second, even if Artis had executed the statement prior to the first trial, the statement should still have been admitted under the applicable rules of evidence. Petitioner's brief (pages 51-55) has shown the reasons why *Mattox* v. *United States*, 156 U.S. 237, 244-250, ought not be applied, and why a subsequent recantation by a witness who has become unavailable ought not to be excluded merely because the witness cannot be given an opportunity to deny or explain making such statements. The applicable principle, however, is by no means confined to statements which the witness makes subsequent to his first-trial testimony.

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[2] The hospital where Artis was admitted in 1958 was not in the Washington area but was the Veterans Administration Hospital, Durham, North Carolina (R. 141).

For example, in the Uniform Rules of Evidence,[3] subsection 3 of Rule 63 deals with depositions and prior testimony as one of the exceptions to the hearsay rule. It is then provided in Rule 65:

> "Rule 65. Credibility of a Declarant. Evidence of a statement or other conduct by a declarant inconsistent with a statement received in evidence under an exception to Rule 63 is admissible for the purpose of discrediting the declarant, though he had no opportunity to deny or explain such inconsistent statement. Any other evidence tending to impair or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness."

Thus it is clear that under the modern rule—which the accompanying Comment states to be "the generally recognized rule"—evidence of the inconsistent statement is admissible whether the inconsistent statement was made subsequent to or prior to the unavailable witness' first-trial testimony.[4]

Accordingly, under any theory the Artis statement should have been admitted for the jury to assess—and so also should the evidence which Judge Holtzoff cut the defense off from adducing, through the witness Bush, concerning statements made by Artis in February 1958, before the first trial, directly contradicting testimony which Artis subsequently gave at the first trial (petitioner's brief, pages 16-17, 54). When Judge Holtzoff ruled (R. 143) that the

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[3] Drafted by the National Conference of Commissioners on Uniform State Laws and by it approved on August 22, 1953; approved by the American Bar Association, August 28, 1953; approved by the American Law Institute, May, 1954.

[4] See also the same position set forth in Rule 531(a) of the earlier Model Code of Evidence, adopted by the American Law Institute, May 15, 1942.

latter testimony was inadmissible because Artis had never been confronted with anything he had said to the witness Bush, and further told defense counsel "I am not going to hear argument on this" (R. 143), he was making a ruling directly in conflict with the modern law of evidence.

(C) As petitioner's brief (pages 57-59) shows, the circumstances were unusual in numerous ways which made the use of the Artis first-trial testimony highly unfair to petitioner. The point is not merely that Judge Holtzoff, under these circumstances, clearly abused his discretion in allowing the Artis testimony to be introduced by the prosecutor and then in failing to protect the defendant's rights to have the subject in its entirety placed before the jury. More than that, Judge Holtzoff failed even to recognize that he had a judicial discretion, under the circumstances, to exclude the Artis first-trial testimony if required in the interests of justice. In determining that the testimony would be admitted he compounded the errors by ruling: "I do not think it is within the discretion of the Court. I think that if the facts are established as to the inability to produce the witness, it is a matter of right to read his prior testimony" (R. 94). For all the errors on the Artis matter which have been discussed in petitioner's brief and in this reply brief, the judgment should be reversed.

IV.

As to the Rule on Accomplice Testimony.

The Government's brief (pages 49-50) says "it is highly unlikely that the jury based its verdict solely on Artis' evidence even as to the incidents as to which he did testify". The record provides no support for this speculative assertion by the Government, and Judge Holtzoff's instructions (petitioner's brief, pages 23, 63) told the jury, most unambiguously, that they might convict on the basis of uncorroborated testimony of the accomplice Artis. If this charge was wrong, the error was fundamental and far from harmless. *Kotteakos* v. *United States*, 328 U.S. 750; *Krulewitch* v. *United States*, 336 U.S. 440, 444-445.

V.

As to the Barry Decision.

The Government's brief (pages 50-53) makes a wholly unsupportable effort to distinguish away the decision rendered by the Court of Appeals in *Barry* v. *United States*, 287 F.2d 340. The Government does not deny that the charge given here by Judge Holtzoff, relating to interstate transportation of forged security, was substantially identical with the charge which Judge Holtzoff gave in *Barry*—which the Court of Appeals subsequently held to constitute plain error requiring reversal.

Instead the Government's brief (page 51) claims that here the facts are different because here "there was no claim that petitioner himself either forged the check or uttered it; his guilt depended on his complicity in the forging and uttering". For this reason the Government contends that it was enough that Judge Holtzoff in his charge explained the aiding and abetting principle.

Surely the Government's argument misconceives the law. Before a man can be convicted as an aider and abetter in the offense of interstate transportation of a forged security, he must have knowledge that the security was falsely made and forged. This is just as much an element of the offense to be proved against the man whom the Government seeks to convict as an aider and abetter, as it is an element of the offense to be proved against the man who personally transported the security. In other words, without complicity in all the essential elements of the offense, there has not been an aiding and abetting in the commission of the offense.

Similarly, the Government's reliance (pages 52-53) on a subsequent portion of the charge (R. 179) does not suffice in any way to establish the Government's contention that "There was thus no possibility that the jury could have convicted petitioner without finding that he knew the checks were forged". What Judge Holtzoff told the jury in this portion of his charge was that if petitioner was driving the car with the intention of bringing the party to a store to which a check was to be presented for cashing, if petitioner knew that was the purpose of the trip, then petitioner was an aider and abettor. But the jury should never have been thus given to understand they might convict if they found only that petitioner was driving someone to the store knowing the other person was to present a check for cashing. This was not enough. Unless the jury also found that petitioner knew the money order about to be cashed was a forged instrument, conviction would be wholly improper. *Nye & Nissen* v. *United States*, 336 U.S. 613, 618-619; *United States* v. *Turnipseed*, 272 F.2d 106 (7th Cir. 1959); *United States* v. *Williams*, 341 U.S. 58, 64, note 4. Accordingly, the charge was not only confusing; it was fundamentally in error and plainly insufficient.

Conclusion

For the reasons set forth in petitioner's brief and in this reply brief, the conviction should be reversed and the case remanded with instructions as set forth at page 71 of petitioner's brief.

Respectfully submitted,

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